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| 10/603,028      | 06/24/2003  | Francesco Robbiati   | D-43515-01          | 2614             |

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| EXAMINER |
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PASCUA, JES F

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PAPER

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Application Number: 10/603,028  
Filing Date: June 24, 2003  
Appellant(s): ROBBIATI ET AL.

MAILED

SEP 28 2007

Group 3700

Priscilla Ashley Darden  
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 21, 2007 appealing from the Office action mailed July 17, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

Claim 1 has been amended subsequent to the final rejection.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

**WITHDRAWN REJECTIONS**

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner. The rejection of claims 1 and 7 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,290,467 to Schmidt and the rejection of claims 2-6 under 35 U.S.C. §103(a) as being unpatentable over Schmidt have been withdrawn by the Examiner.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1 and 3-10 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 5 of U.S. Patent No. 6,260,705 in view of U.S. Patent No. 4,290,467 to Schmidt. U.S. Patent No. 6,260,705 discloses the claimed invention except that U.S. Patent No. 6,260,705 shows the open mouth at the bottom of the bag instead between the edge of one ply and another edge of a folded over film portion. Schmidt shows that an open mouth between the edge of one ply and another edge of a folded over film portion is an equivalent structure known in the art. See Fig. 9 of Schmidt. Therefore, because these two bag mouth locations were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to relocate the bottom, open mouth of U.S. Patent No. 6,260,705 to a position between the edge of one ply and another edge of a folded over film portion.

Furthermore, U.S. Patent No. 6,260,705 and Schmidt disclose the claimed invention, as discussed above, except for the claimed length of the folded over film portion. It would have been an obvious matter of design choice at the time the invention was made to make the length of the folded over film portion whatever dimension was desired (e.g., "less than 5% of the total length of the bag", "less than 3% of the total length of the bag", "less than 1 cm", "less than 8 cm", "less than 0.5 cm"), since such a

modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

Regarding claim 9, U.S. Patent No. 6,260,705 and Schmidt disclose the claimed invention except for the further seal lines meeting at the additional seal line. It would have been an obvious matter of design choice to have the further seal lines of U.S. Patent No. 6,260,705 meet at the additional seal line, since applicant has not disclosed that the further seal lines meeting at the additional seal line solves any stated problem or is for any particular purpose and it appears that the invention of U.S. Patent No. 6,260,705 would perform equally well with the further seal lines meeting at the additional seal line.

Claims 1 and 3-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,260,705 and Schmidt.

U.S. Patent No. 6,260,705 discloses the claimed device except that U.S. Patent No. 6,260,705 shows the open mouth at the bottom of the bag instead between the edge of one ply and another edge of a folded over film portion. Schmidt shows that an open mouth between the edge of one ply and another edge of a folded over film portion is an equivalent structure known in the art. See Fig. 9 of Schmidt. Therefore, because these two bag mouth locations were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to relocate the

bottom, open mouth of U.S. Patent No. 6,260,705 to a position between the edge of one ply and another edge of a folded over film portion.

Furthermore, U.S. Patent No. 6,260,705 and Schmidt disclose the claimed invention, as discussed above, except for the claimed length of the folded over film portion. It would have been an obvious matter of design choice at the time the invention was made to make the length of the folded over film portion whatever dimension was desired (e.g., "less than 5% of the total length of the bag", "less than 3% of the total length of the bag", "less than 1 cm", "less than 8 cm", "less than 0.5 cm"), since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

Regarding claim 9, U.S. Patent No. 6,260,705 and Schmidt disclose the claimed invention except for the further seal lines meeting at the additional seal line. It would have been an obvious matter of design choice to have the further seal lines of U.S. Patent No. 6,260,705 meet at the additional seal line, since applicant has not disclosed that the further seal lines meeting at the additional seal line solves any stated problem or is for any particular purpose and it appears that the invention of U.S. Patent No. 6,260,705 would perform equally well with the further seal lines meeting at the additional seal line.

### (10) Response to Argument

Regarding the rejection of the claims on the ground of nonstatutory obviousness-type double patenting and under 35 U.S.C. 103(a), which apply the same references in the same manner, appellant argues that the combination of U.S. Patent No. 6,260,705 and Schmidt do not meet the appealed claims because the open area between 25' and 21' of Fig. 9 of Schmidt does not teach a bag comprising an open mouth between the edge of one ply and another edge of a folded over film portion in accordance with independent claim 1. Appellant remarks "the term 'mouth' as used in the subject application and independent claim 1 refers to the portion of a bag wherein a product or article is introduced into the open bag." Appellant opines that closure profiles 17' and 18' constitute the mouth of the Schmidt bag and the open area between 25' and 21' embodies a means by which to open closure profiles 17' and 18'. However, Schmidt discloses "In a desirable form, the **filling nozzle 45** is constructed and arranged to **extend diagonally downwardly** into the bag strip 31 at a location downstream and below the guide rollers 41 **to project into the contents receiving area of the bag blank strip 31, through the slit between the pull flange 19 and the adjacent edge 24** of the front panel 21, and between the fastener profiles 17 and 18 which are progressively separated by the nozzle 45 as the strip 31 advances." (emphasis added) See column 4, lines 66-68 through column 5, lines 1-6. The "slit" (or the open area between 25' and 21' of Fig. 9) of Schmidt meets the recitation of an "open mouth" to same degree as structurally set forth in independent claim 1. Although appellant's intended use of the "open mouth" imparts no further structure to independent claim 1 to

define over the open area between 25' and 21' of Schmidt, the Schmidt reference clearly discloses the open area between 25' and 21' to be a portion of a bag wherein a product or article is introduced into the open bag via a filling nozzle.

Appellant further argues that the combination of U.S. Patent No. 6,260,705 and Schmidt do not meet the appealed claims because Schmidt "appears to teach away" from the length of the folded over film portion being less than 5% of the total length of the bag. Appellant refers to column 5, lines 36-45 of Schmidt and opines "that if the bag of the '467 Patent were equipped with an open mouth comprising a folded over portion that was less than 5% of the total length of the bag as recited in independent claim 1 of the subject application, it appears that the support function of the upper portion of the bag of the '467 Patent would indeed be compromised." However, no support for this statement is found at the passage cited by appellant. Furthermore, appellant's specification fails to provide an adequate written description of the criticality of the folded over portion being less than 5% of the total length of the bag or any of the other claimed lengths. Therefore, the Examiner maintains it would have been an obvious matter of design choice at the time the invention was made to make the length of the folded over film portion whatever dimension was desired (e.g., "less than 5% of the total length of the bag", "less than 3% of the total length of the bag", "less than 1 cm", "less than 8 cm", "less than 0.5 cm"), since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art.



In response to appellant's argument that the Schmidt reference fail to show certain features of appellant's invention, it is noted that the features upon which appellant relies (i.e., the folded over portion being in the bottom 5% of the bag) are not recited in the appealed claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims.

Regarding the rejection of dependent claims 3-10, appellant's remarks are silent and rely solely on the arguments presented for independent claim 1.

As discussed above, the rejection of claims 1 and 3-10 under 35 U.S.C. §103(a) applied the same U.S. Patent No. 6,260,705 and Schmidt references in the same manner as the rejection of the claims on the ground of nonstatutory obviousness-type double patenting. Appellant reiterates the arguments made for the rejection of the claims on the ground of nonstatutory obviousness-type double patenting. The Examiner maintains Schmidt meets the recitation of an "open mouth" to same degree as structurally set forth in independent claim 1 and it would have been an obvious matter of design choice at the time the invention was made to make the length of the folded over film portion whatever dimension was desired (e.g., "less than 5% of the total length of the bag", "less than 3% of the total length of the bag", "less than 1 cm", "less than 8 cm", "less than 0.5 cm"); absent any showing of criticality.

The rejection of claims 1 and 7 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,290,467 to Schmidt has been withdrawn by the Examiner, as discussed above, rendering appellant's arguments regarding the rejection moot.

Art Unit: 3782

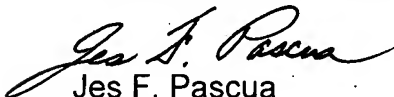
The rejection of claims 2-6 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,290,467 to Schmidt has been withdrawn by the Examiner, as discussed above, rendering appellant's arguments regarding the rejection moot.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

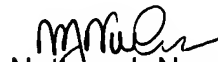
For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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Conferees:



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